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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-349

THE PEOPLE OF THE STATE OF NEW YORK, Petitioner

v.

ROBERT D. WILLETTE, Respondent

The respondent, Robert D. Willette, who is now held in the Suffolk County Correctional Facility in the State of New York, asks leave to file the attached Brief in Opposition to a Writ of Certiorari to the New York State Supreme Court, Appellate Division, Second Judicial Department without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The respondent's affidavit in support of this motion is attached hereto.

LOUISE ANTOINETTE PERROTTA
Counsel for Respondent
Legal Aid Society of Suffolk County
Appeals Bureau
S.U.N.Y. at Stony Brook
Melville Library, Suite N-4061
Stony Brook, New York 11790

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 82-349

THE PEOPLE OF THE STATE OF NEW YORK, Petitioner

v.

ROBERT D. WILLETTE, Respondent

AFFIDAVIT

I, Robert D. Willette, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis pursuant to Rule 53: 1. I am the respondent in the above-entitled case; 2. Because of my poverty I am unable to pay the costs of said cause or to pay for the printing and reproduction costs of the necessary papers in said cause; 3. I am unable to give security for the same; 4. I have been incarcerated since my conviction and sentence on November 23, 1979 and remain incarcerated despite the reversal of my conviction on March 22, 1982 due to my inability to post my bail which was set in April; 5. I had requested to appeal my conviction to the New York State Supreme Court, Appellate Division, Second Judicial Department in forma pauperis and that request was granted and the Legal Aid Society of Suffolk County was assigned as my counsel. [Order of

that Court attached hereto]; 6. I believe that I am entitled to answer and oppose the petitioner's request for certiorari; 7. The nature of said cause is briefly stated as follows:

I was sentenced to a New York State Correctional Facility by the Supreme Court of the State of New York, County of Suffolk, after pretrial hearings on my motions for suppression of statements, severance and to have the trial judge recuse himself (all of which were denied) and my plea to Manslaughter in the First Degree under Indictment # 2224/78 in satisfaction of that indictment and Indictment # 1313-78. I appealed the above determination and conviction in forma pauperis to the New York State Supreme Court, Appellate Division, Second Judicial Department requesting dismissal of the indictment in the interests of justice, suppression of the involuntarily obtained statements and reduction of the excessive sentence. That Court reversed my conviction, suppressed my statements and remanded to the trial court for further proceedings (which are being held in abeyance pending determination of the instant petition for certiorari). Both the petitioner herein and respondent sought and were denied leave to appeal to the New York State Court of Appeals -- the court of last resort in New York State. The petitioner now seeks certiorari to view the New York State Court of Appeals interpretation of the New York State Constitutional provision granting a more expansive right to counsel than provided for by the Federal Courts interpretations of the Federal Constitution.

Robert D Willette
ROBERT D. WILLETTE

Duly witnessed and sworn to before me, a Notary Public, this 10th day of September, 1982.

Frank A. Bacile

FRANK A. BACILE
NOTARY PUBLIC, State of New York
No. 52-4726892 Qual. in Suffolk Co.
Commission Expires March 30, 1984

No. 96

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County, on January 14, 1980.

HON. MILTON MOLLEN, Presiding Justice
HON. JAMES D. HOPKINS)
HON. VINCENT D. DAMIANI) Associate Justices
HON. VITO J. TITONE)

RECEIVED
JAN 21 1980
COURT OF APPEALS
APPELLATE DIVISION
APPELLATE TERM

The People of the State of New York,

Respondent,

v.

Robert D. Willette,

Appellant.

Decision and Order-
Motion to Dispense With Printing and to Assign Counsel - Appeal from Judgment.

Ind. No. 2224/78

In the above-entitled action, the above-named appellant (defendant) having appealed to this court from a judgment of the Supreme Court, Suffolk County, rendered November 23, 1979, and appellant having moved to dispense with printing and for assignment of counsel;

Now, upon the papers filed in support of the motion and papers filed in opposition or relating thereto; and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby granted.

The appeal will be heard on the original papers (including a typewritten certified transcript of the stenographic minutes) and on appellant s and respondent s briefs, which may be in legible typewritten form or in any other legible form authorized by this court's rules and which must comply with said rules (22A NYCRR 670.1 et seq.)

The parties are directed to file eight copies of their respective briefs and to serve one copy on each other.

The stenographer of the trial court is required promptly to make, certify and file two typewritten transcripts of the stenographic minutes of the proceedings of the pretrial hearings, plea of guilty and sentence, unless a daily copy of a transcript has been ordered by the court (22A NYCRR 671.9); in either event, the clerk of the trial court shall furnish one of such certified transcripts to appellant s counsel, without charge (CPL 460.70).

Pursuant to statute (County Law, § 722), the following named attorney is assigned as counsel to prosecute the appeal:

John F. Middlemiss, Jr., Atty in Charge, Legal Aid Society, Suffolk County, NY, Appeals Bureau, P.O. BOX "O", Stony Brook, N.Y. 11790.

Appellant s time to perfect the appeal is enlarged. Assigned counsel shall prosecute the appeal expeditiously in accordance with this court's rules (22A NYCRR 670.1 et seq.) and written directions.

When the assigned counsel serves his brief on the District Attorney, he is required also to serve his copy of the minutes on the District Attorney.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division
Date: 1/14/80 No. 96

Defendant's address:

79 A 3870
354 Hunter St.
Ossining, N.Y.

AFFIDAVIT OF PERSONAL SERVICE

LOUISE ANTOINETTE PERROTTA being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Lindenhurst, New York.

On September 22nd, 1982, deponent served the within Motion to Proceed in Forma Pauperis, Affidavit in Support of that Motion and three copies of a Brief in Opposition to a Writ of Certiorari to the New York State Supreme Court, Appellate Division Second Judicial Department, upon the District Attorney of Suffolk County (Appeals Bureau) at the Criminal Courts Building, Center Drive South, Riverhead, New York, 11901, the address designated by said District Attorney for that purpose, by delivering a true copy (three copies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Petitioner therein.

Louise Antoinette Perrotta

LOUISE ANTOINETTE PERROTTA

Sworn to before me this
22nd day of September, 1982

Monroe Alan Semble

Notary Public

MONROE ALAN SEMBLE
NOTARY PUBLIC, State of New York
No. 30-4746456
Qualified in Nassau County
Term Expires March 19

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SUPREME COURT, U.S.

I, Vincent A. Malito, being associated with the Suffolk County District Attorney's Office (Appeals Bureau) have received this date (September 22nd, 1982) Motion to Proceed in Forma Pauperis, Affidavit in Support of that Motion and three copies of a Brief in Opposition to a Writ of Certiorari to the New York State Supreme Court, Appellate Division, Second Judicial Department, in the matter of People v. Robert D. Willette.

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No. 82-349

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

ROBERT D. WILLETTE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

JOHN F. MIDDLEMISS, JR.
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LOUISE ANTOINETTE PERROTTA, ESQ.
Staff Attorney
Of Counsel

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No. 82-349
IN THE
SUPREME COURT of the UNITED STATES
October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

ROBERT D. WILLETTE,

Respondent.

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

The respondent, Robert D. Willette, respectfully prays that the petition for writ of certiorari to review the order and opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, entered in this proceeding on March 22, 1982 be dismissed for lack of jurisdiction or that such writ be denied.

OPINIONS BELOW

A suppression hearing was held before the trial court to determine the admissibility of statements secured from respondent-defendant. Respondent-defendant contended that these statements were involuntarily obtained due to the denial of his right to an attorney, his being questioned without an attorney although he had an attorney in an unrelated criminal matter, brutality and psychological coercion, during a seven (7) hour period of continuous interrogation, and due to promises. The trial court denied the motion to suppress in all respects. [trial court's oral decision, see Petitioner's Appendix "A"] Respondent-defendant then pled to a reduced charge and was sentenced.

On appeal to the Appellate Division, Supreme Court, Second Judicial Department, respondent-defendant requested dismissal in the interest of justice or suppression of the statement on the above grounds as well as the unnecessary sixty-one (61) hour delay in arraignment, the trial court's failure to recuse itself and hearing court errors. That Court reversed the conviction on the law and sup-

pressed the statements based upon the fact that respondent had an attorney on a pending matter known to the police and the statement was obtained in the absence of that attorney. [citing People v. Rogers, 48 N.Y. 2d 167 (1979)][See Appellate Division order and decision - Petitioner's Appendix "B"]

The petitioner-plaintiff sought leave to appeal to the New York State Court of Appeals and respondent-defendant cross appealed. Both requests were denied. [See denials by Judge Sol Wachtler - Petitioner's Appendix "C"]

JURISDICTION

The petitioner seeks certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated March 22, 1982 suppressing statements obtained from respondent as obtained in violation of respondent's right to counsel as guaranteed by the New York State Constitution as interpreted by the New York Court of Appeals. Petitioner invokes jurisdiction of the Court pursuant to 28 U.S.C. Section 1257(3).

Respondent contends that no jurisidiction lies since the issue involves a state court's interpretation of its own state constitution so as to grant more rights to its citizens. [argument set forth below - Question Number ONE]

QUESTIONS PRESENTED

Question 1

Does jurisdiction lie in this Court to review the petition for writ of certiorari?

Question 2

Do State Courts have the ability to interpret their own state constitutions in a manner so as to give their citizens greater rights than the minimum rights guaranteed under the United States Constitution as interpreted by the Federal Courts?

Question 3

Does the additional protection, provided by the Courts of New York deprive that defendant of his Federal Constitutional right to self representation by mandating that waiver of the right to an attorney is permitted, but only in the presence of an attorney?

Question 4

Do the rights alluded to under the Ninth and Fourteenth Amendments to the United States Constitution, encompass a "right of the public to be protected from criminals who freely and voluntarily admit to the police the commission of a felony"? If so, does the right of a defendant, under the New York Court of Appeals interpretation of the New York State Constitution violate this right?

CONSTITUTIONAL PROVISION/STATUTES INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

NEW YORK STATE CONSTITUTION

ARTICLE 1 §6

§6. [Grand jury; waiver of indictment; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law]

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general

The power of grand juries to inquire into the wilful misconduct in office of public

officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

UNITED STATES CODE, 28 U.S.C. 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646. 62 Stat. 929.

STATEMENT OF THE CASE

On March 13, 1975 Thomas Henderson died at his home in Blue Point, New York. It was later alleged that his death was the result of injuries inflicted when he was beaten with a baseball bat. There was no progress in the case for over three years.

In May of 1978 Robert Charles Gribbons was arrested for Burglary in the First Degree and Robbery in the Second Degree (Indictment #1313-78). He faced treatment as a second felony offender. In consideration for a reduced plea to Burglary in the Second Degree on the above indictment and for not being charged with Murder in the Second Degree, Robbery in the First Degree, Burglary in the First Degree and Conspiracy in the Second Degree (as were the defendants below), Gribbons agreed to cooperate with police on the Henderson homicide. Gribbons alleged that five persons were at the Henderson home at the time of Henderson's death: himself, Kevin Kolb, Ronald

James Kolb, Glen Edward Wagner and respondent.[1]

On September 12, 1978 at 8 P.M. Gribbons, who was wearing a wire, met with respondent and his girlfriend, Candace Norton. They drove around in an unmarked police car and talked.

---

1. The dispositions as to these persons are as follows:

Robert Charles Gribbons was not charged under Indictment #2224-78. He pled to a reduced charge of Burglary in the Second Degree under Indictment #1313-78 and was sentenced as a Second Felony Offender to 3-6 years (Stark, J.), concurrent to his conviction under W-1414 to a reduced charge of Burglary in the Second Degree on which he received 2-6 years.

Kevin Kolb died prior to any charges.

Ronald James Kolb was convicted under Indictment #2224-78 after pretrial hearings and a jury trial. He was sentenced to 25-life for Murder in the Second Degree, 8 1/3-25 years for Burglary in the First Degree and 0-4 years for Conspiracy in the Second Degree (Stark, J.). Kolb's appeal of his convictions have not yet been perfected. He is incarcerated.

Glen Edward Wagner was convicted under Indictment #2224-78 after pretrial hearings and a jury trial. He was sentenced in absentia, after he absconded, for the same crimes and terms as Kolb above. Wagner is presently incarcerated and his appeal has not yet been perfected.

Respondent pled guilty after pretrial hearings to Manslaughter in the First Degree in satisfaction of Indictment #1313-78 and 2224-78 and was sentenced to 0-12 years (Stark, J.). On appeal to the Appellate Division, the conviction was reversed, the statements suppressed and the case remanded for further proceedings. Permission for leave to appeal to the New York State Court of Appeals was denied. Petitioner brought a petition for certiorari. Respondent remains incarcerated as a pre-trial detainee unable to post the bail placed on him.

Police, fearing that respondent had become suspicious of Gribbons, took respondent into custody at 9:30 P.M. Both respondent and his girlfriend, who was neither arrested nor charged, were transported to the Homicide Squad Headquarters. She was questioned and police allegedly obtained a statement. Although Miss Norton claimed that she had been threatened, psychologically coerced and verbally abused, the hearing court determined that this was not the case and that the statement was voluntarily given.

Interrogation of respondent, according to police, began at about 11:30 P.M. (respondent stated it was 8:30 P.M.) on September 12, 1978 and the oral statements were concluded by 2 A.M. on September 13th. Respondent had stated that during this time he was not given his Miranda rights, was denied access to an attorney despite his request, was not allowed to contact his attorney who represented him on an unrelated pending criminal matter (and whom police and the Assistant District Attorney were aware of), was beaten, threatened and promised no jail time to

induce cooperation. He stated that he, nevertheless, did not make any statement until later. The hearing court held the above to be untrue and the statement to have been voluntarily given. Police alleged that a statement was written up but that respondent refused to sign. Assistant District Attorney Sullivan was then contacted at 3:30 A.M., arrived at 4:30 A.M. and spoke to respondent. Respondent stated that Sullivan also made promises of no jail but Sullivan denied this and the hearing court believed him. Sullivan admitted knowledge of respondent's present attorney but alleged that respondent did not want that attorney and waived the right to an attorney. Sullivan left at 5:15 A.M. and respondent signed the statement at 5:30 A.M. on September 13th.

Respondent, who had still not been charged, and his girlfriend remained in police custody on September 13th. Respondent wore a wire for and assisted the police in their investigation. Respondent (still uncharged) and his girlfriend were held in a motel overnight (police claimed they were free to leave but there was a guard with them constantly). Respondent remained in custody on September 14th but his girlfriend was released.

At about 4 P.M., A.D.A. Sullivan spoke to respondent's attorney (who was representing respondent on an unrelated matter) by telephone about the instant case. Respondent was charged in the afternoon of September 14th. He was finally arraigned on September 15th.

A joint pretrial suppression hearing (for Kolb, Wagner and respondent) was held. The trial court, in an oral decision on September 5, 1979, found in favor of the petitioner in all respects and denied suppression of the statements.

> [On September 13, 1979, the New York State Court of Appeals held, in People v. Rogers, 48 N.Y.2d 167 (1979), that where a defendant has been arrested and is at that time represented by an attorney in an unrelated pending criminal matter then no questioning may be conducted nor may a waiver be secured in the absence of that attorney.]

Appellant then pled to Manslaughter in the First Degree on October 2, 1979 as to Indictment #2224-78, in satisfaction of that indictment and of Indictment #1313-78. He was sentenced to 0-15 years (Stark, J.).

Respondent appealed to the New York State

Supreme Court, Appellate Division, Second Judicial Department requesting dismissal of the indictment in the interests of justice or suppression of the statements and reduction of the sentence. He presented his contentions of brutality, promises, threats, denial of a right to an attorney (no Miranda, requested but denied an attorney, inability to waive right to an attorney, in the absence of his presently retained attorney), 61 hour delay in arraignment, failure of the trial court to recuse itself and hearing errors. That Court reversed the conviction and suppressed the confession based upon People v. Rogers, supra, holding that no waiver of the right to an attorney who is appearing in a pending unrelated matter can be effective when made in the absence of that attorney. That Court did not address respondent's remaining arguments. The case was remanded to the trial court for further proceedings. Those proceedings were delayed pending further appeal and the instant petition for certiorari. (order dated March 22, 1982)

Petitioner now seeks a writ of certiorari from this Court. (filed August 24, 1982 for the October 1982 Term) Respondent opposes the granting of this writ.

QUESTION NUMBER ONE

Does jurisdiction lie in this Court to review the petition where the issue is a state court's interpretation of its own state constitution thus granting greater rights for its citizens?

The petitioner, by their jurisdictional statement, invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1257(3) which reads as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

The instant jurisidiction is defective and the petition for writ of certiorari should be denied.

Clearly only the second clause of 28 U.S.C. 1257(3) is even arguably relevant. The issue herein is the ability of a state to interpret its own state constitution independently of and in magnification, not diminution, of the minimal

rights guaranteed by the United States Constitution. This Court held that, for purposes of this statute, a constitutional provision is a "statute" within the meaning of 28 U.S.C. 1257. PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980). This statute merely allows review - it does not mandate such review. Review should be denied for the reasons set forth in this and the subsequent arguments.

The state's decisions being contested herein are People v. Rogers, 48 N.Y.2d 167 (1979) and People v. Bartolomeo, 53 N.Y.2d 225 (1981). Rogers was specifically decided by the New York State Court of Appeals based upon the New York Constitution not the United States Constitution. People v. Rogers, supra at 171.

It has long been held by this court that

> . . . where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [this court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) [See also National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958)]

This Court has adhered to this principle from as far back as Klinger v. Missouri, 13 Wall 257,

263. In a recent decision this Court has, consistently with the above, stated that

> [a]s to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in federal courts. Wainwright, Secretary, Department of Offender Rehabilitation of Florida v. Sykes, 433 U.S. 72, 81 (1977). [See also Fay v. Noia, 372 U.S. 391 (1963)]

This Court has held that where a decision is unclear as to whether it rests on the state or federal constitution, there is no jurisdiction in this Court. The case must be remanded for clarification. Ohio v. Gallagher, 425 U.S. 257, 260 (1976); Dept. of Mental Hygiene of California v. Kirchner, 380 U.S. 194 (1965).

The New York State Constitution (Article I§6) provides protection of the right to an attorney, independent of the United States Constitution (Amendment 6). This protection meets at least those minimal federal constitutional safeguards. The New York State Court of Appeals has provided greater protection of this right explicitly through its interpretation of the New York State Constitution's right to an

attorney provision and not of the federal constitution. People v. Rogers, supra at 171. Clearly then, adequate and independent state grounds exist for the expansion of the right to an attorney in state criminal proceedings under state mandate. Therefore, under the principle of federalism and the past holdings of this Court, the New York State decisions are immune from federal review and the jurisdiction of this Court fails.

A state is, furthermore, entitled to exercise and restrict its own police powers without federal interference so long as it does not deny its citizens the minimal protections of the United State Constitution as interpreted by this Court. [For full argument see Question Two] Since the decisions herein merely enhance the rights of the citizens of the State of New York, there is no jurisdiction in this Court.

QUESTION NUMBER TWO

Do State Courts have the ability to interpret their own state constitutions in a manner so as to give their citizens greater rights than the minimum rights guaranteed under the United States Constitution as interpreted by the Federal Courts?

Petitioner alleges that the guaranty of

a right to an attorney under the United States and New York State Constitutions are couched in "virtually identical" language:

> [i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. United States Constitution, Amendment VI (in part)
>
> . . .[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . . New York State Constitution, Article 1 §6 (in part).

Petitioner therefore contends that the protections afforded under the New York Constitution must be identical to and not greater than - the minimum rights under the United States Constitution. This argument is untenable.

Consideration of the rights guaranteed under the Constitution must first encompass a brief review of the history of these guaranties in our country and the intentions of their drafters. Our constitution was originally drafted and presented with a Bill of Rights. In spite of the arguments by Hamilton, Jay and Madison in The Federalist Papers asserting the needlessness of an explicit listing of rights, adoption of the Constitution was not secured until a Bill of Rights was promised. The popular fear of an over-

whelming central (federal) government necessitated this document. The Fourteenth Amendment was passed in 1868 to insure that the states also honored at least the minimum rights guaranteed by the Federal Constitution and to protect the public from the government. Chambers v. Florida, 309 U.S. 227 (1940); People v. Hobson, 39 N.Y.2d 479 (1976).

Clearly, then, the Federal Bill of Rights was intended at its inception as the guarantor of a minimum standard. People v. Adams, 53 N.Y.2d 239 (1981). It defines a limit below which the federal and, through the Fourteenth Amendment, the state government may not act. In interpreting the Constitution and the Bill of Rights, this Court has adopted this theory by its pronounced concern with federalism considerations. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). This Court has held that Federalism allows a variety of solutions to a problem and does not merely attempt to force each state into a solitary mold. Addington v. Texas, 441 U.S. 418 (1979).

The decisions wherein the right to counsel in New York State is expanded are People v.

Rogers, 48 N.Y.2d 167 (1979) and People v. Bartolomeo, 53 N.Y.2d 225 (1981).[2] In Rogers, the New York Court of Appeals[3] explicitly and solely relied upon its interpretation of the New York State Constitution, Article I §6 without refering to the Federal Constitution. Bartolomeo relied on Rogers and is likewise founded on New York law. Both Rogers and Bartolomeo concededly go beyond this Court's interpretation of the Federal Constitution.

States are permitted to give greater rights to its citizens under their state constitutions. This Court has recognized this fact and has determined that it will not unnecessarily interfere in the state's province.[4]

In Patterson v. New York, 432 U.S. 197, 201-202 (1977) when considering the propriety of New York's "affirmative defense" and the burden of proof when such a defense is raised, this Court limited its interference in the expansion of rights under state constitutions when it stated that:

> It goes without saying that preventing and dealing with crime

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2. The decisions of Rogers and Bartolomeo are reproduced herein as Appendices "D" and "E".

3. Herein the New York Court of Appeals will be referred to as "New York".

4. see Jenkins v. Anderson, 447 U.S. 231, 240-241 (1980) where this Court stated that states may give greater evidentiary rights.

> is much more the business of the States than it is of the Federal Government, Irvine v. California, 347 U.S. 128, 134 (1954)(plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,". . . Speiser v. Randall, 357 U.S. 513, 523 (1958); Leland v. Oregon, 343 U.S. 790, 798 (1952); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). [emphasis added]

The Miranda rule evolved solely as a procedural safeguard to protect the accused against compulsory self incrimination. Michigan v. Tucker, 417 U.S. 433, 438-439 (1974); People v. Hawkins, 55 N.Y.2d 474, 483 (1982). The right to an attorney is protected by the Miranda rule and is therefore, by definition, such a procedural safeguard.

New York has long accepted these concepts as well as the theory of Federalism. It is acknowledged by the state courts themselves that they have cherished the rights of their citizens and have thus interpreted their constitution so as to guaranty more rights than

this Court has provided through its interpretation of the Federal Constitution. People v. Adams, supra; People v. Blake, 35 N.Y.2d 331 (1974). New York has, consistent with this Court, held that the Federal Constitution defines only the minimum level of individual rights and leaves the state free to provide greater rights under its state constitution. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); Cooper v. Morin, 49 N.Y.2d 69, 79 (1979); People v. Rogers, 48 N.Y.2d 167 (1979); People v. Hobson, 39 N.Y.2d 479, 483-484 (1976).

Petitioner's reliance is misplaced in attempting to use People v. Ponder[5] in support of its position that where the Federal and State constitutions are "virtually identical" then the Federal interpretation must be exactly followed by the state. Ponder concerned automatic standing to challenge a search and seizure. The Court of Appeals noted in its decision that the automatic standing rule was engendered by a decision of this Court. [Jones v. United States, 362 U.S. 257 (1960)]. New

5. People v. Ponder, 54 N.Y.2d 160 (1981)

York explained that due to that holding, it had "felt constrained" to apply the rule. After the later abrogation of that rule by this Court [U.S. v. Salvucci, 448 U.S. 83 (1980)], New York was no longer constrained. In passing, the decision mentioned that the "identity of language supports a policy of uniformity in both State and Federal courts." Ponder, supra at 165. This statement was merely an aside. That court's main concern was the "constraint" it felt due to this Court's elevating the minimum rights under the Constitution thus mandating that New York follow suit. Once this standard was lowered, New York was also free to lower its standards. The decision concerns the raising of the minimum (federal) rights guaranteed which requires that the state meet those rights and not fall below. It in no way limits a state's ability voluntary expansion of rights. In Ponder, New York chose to adopt the minimum (federal) standard. In the instant case, New York chooses to amplify the rights guaranteed to citizens of its states beyond the minimum (federal) standard.

Furthermore, if this proposition were accepted, it could be argued that almost the entire Federal Bill of Rights is reproduced some-

where in the New York State Constitution. Under such a construction the rights guaranteed under the state constitution are superfluous and, therefore, without any meaning of their own.

If the Federal Constitution as interpreted by this Court comprises the sole ruling body of laws concerning the rights of citizens then there would be no need for independent State Bills of Rights. This Court has adopted this aspect of Federalism by restraining its actions prescribing constitutional rules of procedure (Miranda rights are procedural)which would displace or foreclose the development of State rules specifically tailored to local problems and experiences. PruneYard Shopping Center, supra at 81; Patterson v. New York, supra at 201-202; People v. Adams, supra at 250.

New York acted constitutionally and under the accepted theories of Federalism in interpreting the State constitution so as to grant its citizens more than the minimum (federal) rights guaranteed by the Constitution. The Supremacy Clause cannot now be distorted and perverted so as to violate the theories of Federalism, the intent of the drafters of the Bill of Rights and the decades of Federal and state case law.

QUESTION NUMBER THREE

Does the additional protection, provided by the Courts of New York deprive that accused of his Federal Constitutional right to self representation by mandating that waiver of the right to an attorney is permitted, but only in the presence of an attorney?

Petitioner contends that, as New York interprets its constitution, the right to an attorney has deprived the accused of his right to self-representation. This is not the case.

New York has interpreted its constitutional right to an attorney to require the presence of an attorney for an effective waiver of that right where the accused (who is in custody on a criminal matter and police wish to question him on that matter) is presently represented by counsel on a pending non-related criminal matter and the representation is known to the law enforcement authorities. People v. Rogers, 48 N.Y.2d 167 (1979); and People v. Bartolomeo, 53 N.Y.2d 225 (1981). This concededly provides a more expansive right to an attorney under the state constitution than has been held to exist under the Federal Constitution. This is a permissible extention since it insures more rights, not less, than the minimum federal rights. [see argument Question Number Two]

The right to appear pro se is guaranteed by both the United States (Amendment VI) and New York State (Article 1 §6) Constitutions. This right is not violated by recent New York decisions.

The New York decisions appear to support the logical conclusion that if an accused has once (and this being recently) requested the assistance of counsel there is a stronger presumption that he would wish counsel on the second matter. But the decisions do not state this as an all-inclusive proposition. The extension of the right has been limited to the effect that knowledge of present representations will not be imputed to the police. People v. Servidio, 54 N.Y.2d 951 (1981). A duty to inquire is placed on the police only where they have knowledge of a prior arrest and a strong possibility of representation. People v. Smith, 54 N.Y.2d 954 (1981) [police officers testified he "assumed" accused had an attorney]. Therefore any infringement on the right to self representation effects only a very limited number of cases. Even in those situations where Rogers prevents waiver outside the presence of the present attorney, the right to self representation is not

denied.

At most, the only intrusion on the right to self representation, is a slight delay in the waiver and subsequent questioning. Once counsel is present, the accused may exercise the waiver. These provisions are for the protection of the accused. Considering the minimal interference in any possible claim of the right to self representation, the greater rights and protections made available in New York outweighs that interference.

The more expansive right to an attorney provided by interpretation of the New York State Constitution does not deprive the accused of his right to self representation.

QUESTION NUMBER FOUR

Do the rights alluded to under the Ninth and Fourteenth Amendments to the United States Constitution, encompass a "right of the public to be protected from criminals who freely and voluntarily admit to the police the commission of a felony"? If so, does the right of a defendant, under the New York Court of Appeals interpretation of the New York State Constitution violate this right?

The contention that the expansion of the right to an attorney violates a "new" constituted right [i.e. the "right of the public to be protected from criminals who freely and voluntarily

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The contention that the expansion of the right to an attorney violates a "new" constituted right [i.e. the "right of the public to be protected from criminals who freely and voluntarily

admit to the police the commission of a felony"] is unfounded.

Knowledge of the idealogy of our founding fathers and a review of our constitutional growth manifestly brands such a "right" inconceivable. As stated previously (see Question Number Two) the Bill of Rights was added to our Constitution due to the fears of the populace of an overwhelming central (federal) government. (see The Federalist Papers) They feared a repeat of the tyranny and aggression in England by the majority over the minority. Our rights were enumerated to protect the public from the government Chambers v. Florida, 309 U.S. 227 (1940); People v. Hobson, 39 N.Y.2d 479 (1976). Our Courts, true to these ideals, have consistently guarded against free rule by the majority merely because it is the majority. They have applied balancing tests - to judge whether the interest of the individual or the state is greater in each incident.

Petitioner's claim to a new "right" threatens to negate almost 200 years of protection under the Bill of Rights and to cast aside the ideals and aspirations of our founding fathers. This "right" would place the interests of the majority above

those of the individual and annul the balancing test.

Even if we were to accept the existence of such a right, arguendo, it could not pertain in the instant situation.

The Constitution guarantees that

> [n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . (United States Constitution, Amendment V)

A confession is the most damning evidence in a criminal case. With a confession, a conviction could (but for the protections in our Constitution) be obtained based upon the accused's own utterance. Even with our protections, a confession is extremely persuasive evidence and tends to negate any "reasonable" doubts of the jury.

While it may be accurately contended that the state and "the people" have an interest in the apprehension and conviction of criminals, we cannot so dilute our protections so as to speculate with the rights of all. The greater good is the protection of our individual rights.

Furthermore, the right to an attorney as enhanced in New York does not incapacitate the police in their duties or the state in its prose-

cution. Conviction could not be had on the confession alone in any event. Confessions are not abrogated by the rule but are, rather, strengthened by assuring total conformity with the guaranteed rights through the presence of an attorney or a waiver obtained in the presence of that attorney. This restriction also is only applicable where it can logically said that in good faith the police knew of the present representation by an attorney on an unrelated pending criminal matter.

> The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming. People v. Rogers, supra at 173.

There is herein, no overriding "right" of the public which is violated by the right to an attorney as guaranteed in New York under the New York Constitution.

CONCLUSION

The petition for a writ of certiorari should be dismissed or denied.

Respectfully submitted,

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